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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 724

AUCLAIR TRANSPORTATION, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing appellant's complaint which had sought to enjoin an order of the Interstate Commerce Commission. The Commission's order granted five applications by Railway Express Agency ("REA") for certificates of public convenience and necessity authorizing operation as a common carrier by motor vehicle of general commodities

moving in express service pursuant to Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 307(a).[1]

REA is a corporation whose stock is wholly owned by the principal railroads of the United States (J.S. 26). It was organized by these carriers in 1929 to provide the public with express service (J.S. 52). Express companies are classified under the Interstate Commerce Act as common carriers pursuant to the Hepburn Act of 1906 (34 Stat. 584, 49 U.S.C. 1(3)(a)).[2] REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications and has been called upon to handle, *inter alia,* commodities which are injurious or contaminating to other shipments, commodities requiring special care and protection, and commodities which require armed guard and surveillance (J.S. 45, 46).

Although REA has depended primarily on rail transportation for the performance of its line-haul

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[1] The applications sought authority to transport general commodities (including class A and B explosives) in express service over the following routes: (J.S. 41–42)

Sub No. 1515—(1) between Boston, Mass., and Manchester, N.H.
(2) between Boston, Mass., and Dover, N.H.
1577—(1) between White River Junction, Vt., and Whitefield, N.H.
(2) between Wells River and Newport, Vt.
1594—between Manchester, N.H., and White River Junction, Vt.
1595—between Boston, Mass., and Portland, Maine.
1687—between Hoosick Falls, N.Y., and Middlebury, Vt.

Section 207(a) of the Act and other pertinent statutory provisions are set forth at J.S. 118–122.

[2] REA is not a carrier by railroad under the Interstate Commerce Act (J.S. 68). See *United States* v. *American Railway Express Co.*, 265 U.S. 425.

requirements in the past, its contract with the railroads permits it to utilize any transportation mode for the movement of express (J.S. 53). REA performs some express service under agreements with airlines (J.S. 53). With the discontinuance of passenger train operations, REA has turned increasingly to operation of its own motor equipment over routes previously served by train (J.S. 53, 54); it is this circumstance that gave rise to the five applications involved here (J.S. 46, 48). Before conducting such motor operations, REA must obtain certificates of public convenience and necessity from the Commission pursuant to Section 207(a) of the Interstate Commerce Act (J.S. 121).

Separate hearings on each of the five applications were conducted by Joint Boards of representatives of the States involved, except in the case of Sub. No. 1687 which was heard by a Commission hearing examiner.[3] In each instance a finding was made that the public convenience and necessity required the issuance of the certificate, subject to certain restrictions. On exception to the reports of the Joint Boards covering three of the applications (Sub. Nos. 1577, 1594 and 1595), Division 1, after finding that REA's proposed operations were well within the definition of express service (J.S. 110–111) and that there was a public

[3] Section 205(a) of the Interstate Commerce Act, 49 U.S.C. 305(a), requires the Commission to refer, *inter alia*, applications for motor carrier certificates for operations involving not more than three States to Joint Boards composed of one member from each State within which the operations are to be conducted. When the application involves operations in more than three States, the Commission may, in its discretion, assign the matter to a hearing examiner.

need for such service (J.S. 111–112), granted REA's applications subject to the following four conditions (J.S. 117):

> (1) The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of rail or air express service.
>
> (2) Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.
>
> (3) The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall be limited, in point of time, to a period expiring 5 years from the date of the certificate.
>
> (4) Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxiliary to, or supplemental of, express service.

An additional condition was imposed in Sub. No. 1595 (J.S. 43):

> Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement by rail or air, except that applicant may render local express service solely between Boston, Mass., and Portland, Maine.

On oral argument and reconsideration, the entire Commission reviewed the matter and on October 5, 1962, issued a Report and Order, affirming Division 1, with minor modifications (J.S. 39–90). Its opinion undertakes "a thorough re-examination of REA op-

erations" (J.S. 54) and incorporates the following findings: that the service covered by each of the five applications was needed by the shipping public for expedition and special handling of a variety of shipments (J.S. 46–51); that none of the protestants had furnished an express service; and that they had made no showing that they were interested in or capable of doing so (*ibid.*).[4] It observed, as it has on past occasions, that express service involves "the expedited handling of small-parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges" (J.S. 59).[5]

In dealing with the distinct nature of REA's service, the Commission also pointed out that REA shipments average only about 50 pounds, in contrast to the 200-pound average of shipments handled by protestant Dubrey (J.S. 62–63), and that while the record did "not establish conclusively a firm division of small and large parcel traffic between REA and ordinary common carriers in all circumstances" the evidence showed "the strong probability of such a division" (*ibid.*).

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[4] Protestant Dubrey, a motor common carrier, conceded before the Commission that although its certificate and tariffs would authorize express service, REA performs a service which it is not accustomed to rendering (J.S. 51).

[5] In similar vein, it stated (*ibid.*) that a service may be characterized as an express service on the basis of its "expediency, premium rates, and special handling" as contrasted with "the services and rates provided and assessed usually by common carriers or ordinary freight."

Having found that there was a need for the services proposed by REA, the Commission next considered whether the policy of Section 5(2)(b) and the National Transportation Policy (J.S. 118–120) required it to impose the restrictions which it has customarily applied to rail-affiliated motor carrier operations. It concluded that such restrictions were not appropriate here because of the unique characteristics of express service.[4] Noting that "special circumstances" may obviate the need for some or all of the restrictions imposed on *any* rail-affiliated motor carrier under Section 207(a), the Commission stated that "we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist" (J.S. 83). The Commission substantially approved the restric-

[4] In this connection, the Commission reviewed the history of its licensing policy with regard to rail affiliates generally. It found that the peculiar characteristics of express service had resulted in the imposition upon REA of restrictions different from those imposed upon ordinary rail-affiliated motor service. While the latter service was ordinarily restricted to service auxiliary to or supplemental of railroad operations, the REA restrictions had always referred to service auxiliary to or supplemental of "air or railway *express* service" (J.S. 66–67, emphasis in ICC report); the "air or railway" portion of the restriction being "merely an evidentiary reflection of the way in which express traffic usually moves . . ." (J.S. 70). The Commission noted that, in distinction from other rail-affiliated motor carriers, REA's certificates had never been restricted to serving points located on a railroad. Finally, the Commission stated that a restriction limiting REA's services to those having an immediately prior or subsequent movement over steel rails (the so-called "rail-haul" restriction) was simply utilized in the past "to reflect the type of need shown in each case for the service proposed" *i.e.*, an integrated rail motor movement. (J.S. 72).

tions recommended by the initial decision, set forth *supra* (J.S. 88–89).[7]

The district court sustained the Commission's award of the five certificates, rejecting the two major contentions raised by appellants: (1) that the Commission, through an erroneous application of the definition of express service, had mistakenly concluded that a public need existed for the express service authorized; and (2) that the Commission should have imposed a "rail-haul" restriction because the policy of the Interstate Commerce Act is opposed to rail-affiliated motor operations unrelated to rail operations.

With respect to the public need for express service, the court stated that the Commission's definition of express service was conceded by plaintiffs to be "well-recognized" (J.S. 30). The court then referred to the "voluminous evidence" that there is need for the service; that it is a continuation of the express service formerly handled by discontinued rail passenger trains; and that extensive express shipments are now being handled by REA pursuant to temporary operating authority (J.S. 31). The court noted that the plaintiffs "do not challenge the finding that they have to date shown no willingness to perform express service of any kind" (J.S. 32), and concluded (J.S. 33–34):

> Plaintiffs have failed to show that the Commission's findings are insufficient as a matter

[7] The specification of "rail or air" express service in the first restriction was removed; in No. 1687 the second restriction was replaced with one requiring an immediate prior or subsequent movement in express service. And, the "rail-haul" restriction imposed in No. 1595 was removed.

> of law to support its discretionary judgment that the public convenience and necessity require the issuance of the certificates which REA was granted. Nor have they shown that the findings are unsupported by substantial evidence.

The court also concluded that there were special circumstances justifying the Commission's refusal to restrict REA's operations to situations in which there was an immediately prior or immediately subsequent movement of the goods over steel rails. The court stated that the Commission was well within its authority in granting the certificates unrestricted in this manner since otherwise shippers would have been denied express service, motor common carriers being unable or unwilling to perform such service (J.S. 36–37). This result was also held to satisfy the National Transportation Policy (which requires the Commission to recognize and preserve the inherent advantages of each mode of transportation) since express service is *sui generis* and competitive to only a limited extent with motor common carriers (J.S. 37).

ARGUMENT

Although framed in the form of five different questions, the jurisdictional statement essentially presents two issues: whether the service to be rendered by REA was properly held to be "express service" as that concept has been defined by the Commission; and whether the district court erred in affirming the Commission's finding that special circumstances and the unique characteristics of REA's express service justify the lack of a rail-haul restriction in the cer-

tificates. Viewed in the light of the evidence and findings, neither issue presents a substantial question warranting plenary review.

1. Appellants argue (J.S. 17–22) that the Commission erred in failing to apply the accepted definition of "express service" in determining whether the grant of REA's applications would serve the public convenience and necessity. They do not quarrel, however, with the definition of express service stated by the Commission in its report (J.S. 17). Nor, as the district court noted (J.S. 32), do they claim that existing motor common carriers are willing and able to provide the service to be rendered by REA. Essentially, then, they concede that REA offers a unique service which is different from ordinary motor carrier operations and which those carriers are unwilling to supply. This, we submit, is a sufficient answer to appellants' contention.

In addition, however, the record includes ample evidence showing that the service to be offered by REA meets the commonly accepted definition of an express service. It is a service for small parcel traffic. Statistics compiled for a representative seven-day period over the very routes for which REA sought permanent authority disclosed that the average weight of each REA shipment was 41.5 pounds and the average weight of each piece was 28.9 pounds. In contrast one of the protestant motor common carriers had shipments averaging 200 pounds (J.S. 62–63). REA offers the special handling needed for the shipment of perishables, such as shellfish and eggs, and the armed

surveillance required by shippers of highly valuable items such as silverware and electronic equipment. Such care is a dominant characteristic of express service. Finally, REA offers an expedited service on a daily basis (J.S. 49–50).*

Appellants may be suggesting (J.S. 7, 15, 18, 22) that although REA offers an express service, there is no need for that service and, once authorized, REA will merely draw traffic which would be regularly handled by the motor common carriers. If this is their contention, it is fully answered by the district court's holding that substantial evidence (summarized at J.S. 30–32) supported the Commission's determination of a public need and a desire for the express service to be performed by REA. See *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 194.

2. The unique characteristics of express service also establish that the Commission was acting within its discretion in concluding that no "rail-haul" restriction need be imposed on the certificates awarded to REA.

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* Appellants question the rates REA proposes to charge (J.S. 17–22). But as the district court held, whether or not REA's rates are presently at a level appropriate to the premium quality of its service is irrelevant to the case at bar. (J.S. 33). Plaintiff's remedy against unduly low rates is in a complaint proceeding against the rates under 49 U.S.C. 316(a), not in a certificate proceeding which can properly deal only with the service aspects of REA's operations. *American Trucking Ass'ns.* v. *United States*, 326 U.S. 77, 86–87; *Railway Express Agency* v. *United States*, 153 F. Supp. 738, 741 (S.D. N.Y.) affirmed 355 U.S. 270. "Until this administrative remedy has been exhausted, complaint to the courts is premature" (*ibid.*). The Commission, at the present time, has before it several proceedings regarding REA's rates, in which motor carriers are participating. *E.g.*, *Freight, All Kinds, L.C.L. Container Charges–U.S.A.*, I.C.C. Docket 33977.

Section 5(2)(b) forbids acquisition of motor carriers by railroads or their affiliates unless the acquisition will be auxiliary and supplemental to the rail carriers' services. This statute reflects a Congressional purpose to prevent wholesale incursions by rail carriers into motor carrier operations. It was intended to answer fears that the rail carriers, by subsidizing their affiliates' competition against motor common carriers, might destroy this competing mode of transportation. *United States* v. *Rock Island Motor Transit,* 340 U.S. 419, 432. The policy of Section 5(2)(b) is applied to certificate proceedings under Section 207 and has been interpreted to forbid certification of a rail-affiliated motor carrier for service other than that auxiliary to and supplemental of rail service except when "special circumstances" justify the lifting of the restrictions. *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141; *American Trucking Ass'ns.* v. *United States,* 364 U.S. 1.

To meet this test, the Commission must find, on specific facts and circumstances, that unrestricted operations by the rail affiliate are in the public interest. *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141, 149, 150. In this case, the Commission initially made an exhaustive review of the unique function and other attributes of express service and an analysis of its historic practices in certificating REA. Based upon this review, it recognized that the restrictions ordinarily appended to rail-affiliated motor carrier certificates "may not be relaxed, and the motor vehicle operations accordingly dissociated with those of the parent, unless special circumstances

are shown to exist" (J.S. 82). Turning to the authority sought by REA, the Commission concluded: "[W]e are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist" (J.S. 83). The district court in turn affirmed the Commission's decision not to impose the "rail-haul" restriction, holding that "the Commission has in fact found the necessary special circumstances" (J.S. 36).

Appellant professes to find an inconsistency between the rationale of the Commission's decision, which it claims was based on a theory that REA's express service is unique, and the district court's affirmance of the Commission's decision on the basis of a finding of special circumstances. Apart from the fact that the Commission made a finding, *in haec verba*, that special circumstances in fact exist, it is clear that the Commission's statement of the unique position of REA was but an extended review of the factors which, in its judgment, provide a basis for determining the scope within which REA is to be permitted to conduct motor carrier operations. Moreover, as the district court noted (J.S. 35), the unique characteristics of, and the public need for, express service had been relied on by the Commission in granting certificates to REA in the past without a rail-haul restriction. See *e.g.*, *Railway Express Agency, Inc., Extension of Operations—Newport, R.I.*, 31 M.C.C. 689.

In any event, the requirement of "special circumstances" is but an expression of the Commission's continuing duty to adjust the competing claims of

rail carriers and motor carriers pursuant to the National Transportation Policy (49 U.S.C. preceding § 1) (J.S. 118), which requires the Commission "to recognize and preserve the inherent advantages of each [mode of transportation]." As this Court has said, the policy of Section 5(2)(b) is "a guiding light, not . . . a rigid limitation" when applied to certificate applications for motor service by rail carriers or affiliates. See *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141, 149. Judged by this standard, the Commission's grant of the certificates is this case properly preserves for shippers the flexibility and expedited service inherent in express service while leaving to motor common carriers their usual operations, which are non-competitive with express service.[9]

3. Although appellants claim that the Commission's decision will enlarge REA's operations under existing certificates, by enabling them to "tack" numerous certificates together, it is plain that such fears are unfounded. The Commission took note of REA's practice of tacking certificates together and thereby performing a through all-motor service despite restrictions (in some of its certificates) requiring immediately prior or subsequent movement by rail. It

[9] The undesirable result of indiscriminate imposition of a rail-haul restriction in REA certificates was graphically stated by Division 1. In describing REA's operation in Sub Nos. 1577 and 1594 in the event a rail-haul restriction were imposed, the Division noted that because of the lack of passenger train service, "shipments moving from, to, or through Boston would have to move by freight trains or in a highly circuitous manner by passenger trains" (J.S. 115).

declared the practice "not permissible," told REA to petition for modification of these certificates within 90 days, and invited the interested parties to participate (J.S. 74). Also the Commission expressly retained jurisdiction over the awards and reserved the right to impose such further restrictions as may be necessary (J.S. 89).

CONCLUSION

For the foregoing reasons, we believe this appeal presents no substantial question warranting plenary review by this Court, and that the judgment of the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964